The Cramdown

Tampa Bay Bankruptcy Bar Newsletter — Winter 2002

The President's Message

By Zala L. Forizs

Bankruptcy Lawyer/Trial Lawyer

In the past bankruptcy lawyers were not especially known for their skills as trial lawyers and most bankruptcy lawyers did not feel the need to finely hone their trial skills and their knowledge of the substantive law governing trials. Developments over the past year suggest that we bankruptcy lawyers need an attitude adjustment.

On January 8, 2002, Judge Williamson gave a timely and informative CLE luncheon presentation on evidentiary issues which frequently arise in bankruptcy court. The topics included the admissibility of expert testimony when the court acts as gatekeeper for the admissibility of expert testimony under the doctrines enunciated by the United States Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1933), and Kumho Tire Co. v. Carmichael, 526 U. S. 137, 119 S. Ct. 1167 (1999), and their progeny. Our next month's luncheon on February 12 will be given by Judge Corcoran on trial techniques and tips. In one of our recent Cram down editions Judge Corcoran also wrote about the effective use of demonstrative aids at hearings.

In December of 2000 all the provisions of Rule 7026 of the Bankruptcy Rules became mandatorily applicable to adversary proceedings. The Middle District rules were amended accordingly. This has ushered in a new era in how adversary proceedings are tried. It is apparent that our bankruptcy judges expect practitioners to be aware of the changes and to conform to them.

While full compliance with Bankruptcy Rule 7026 facilitates an efficient and focused final evidentiary hearing, it requires a great deal of time and attention to comply with the pretrial procedures mandated by the rule. Inadequate compliance with the rule could have serious consequences. For example, Rule 7026(a)(2) requires the filing of an expert witness's written report which, among

(Continued on page 2)

Inside This Issue

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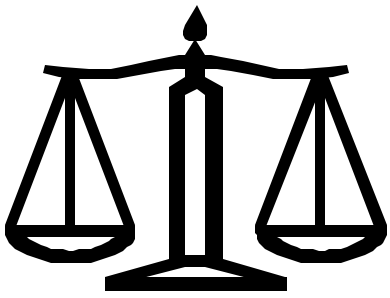
(Continued from page 1)
other things, must contain a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, and any exhibits to be used as a summary or support for the opinions. These disclosures go to the heart of the admissibility of the expert's testimony under Rule 702 of the Federal Rules of Evidence and the Daubert analysis. If this written report does not address all of the elements necessary to make the opinion testimony admissible, will the expert be permitted, at trial, to fill in the missing elements, or will the testimony be precluded because of the deficient written report? I posed this question to Judge Williamson after our CLE luncheon. He declined to state his opinion, but stated that it will be interesting to see how courts will deal with the issue.

Rule 7026(a)(3) also requires, among other things, the filing and service of, "an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises." The rule further provides that the adverse party waives objections to the admissibility of the listed documents if objections, together with the grounds therefore, are not made within 14 days of the service of the list. Pretrial orders in the Middle District often require the objection to be made in a joint pretrial stipulation, but in either event, objections not timely made will result in the admissibility of the document. Since grounds for the objection must be stated, grounds not asserted are presumably waived. For this rule to have any meaning, the listing of documents by broad category would not comply with the rule.

These requirements (and there are many more) add significantly to the cost of litigation. Arguably these procedures should not be necessary in relatively simple adversary proceedings. Presumably, this was the rationale of the Middle District's former rule which provided that Rule 7026 was not applicable unless the court otherwise required it. Now the rule automatically applies unless the court in the adversary proceeding orders otherwise. Therefore, litigants might give thought to asking the court for relief from some of the provisions of the rule in an appropriate case. However, I suspect that the judges may be reluctant to suspend the application of the rule in most situations. This is because careful compliance with the rule by all litigants greatly simplifies and expedites the actual final evidentiary hearing.

In the long run our judges' emphasis on trial skills and Rule 7026 will increase the quality of trials conducted in Bankruptcy Court; and they will tend to erase the perception that bankruptcy lawyers and trial lawyers are separate breeds. This is a good thing.



U.S. TRUSTEE PROGRAM LAUNCHES BANKRUPTCY CIVIL ENFORCEMENT INITIATIVE

By Cynthia P. Burnette

The United States Trustee Program has launched an initiative to more aggressively use existing civil enforcement methods to curb abuse of the bankruptcy system, Martha Davis, Acting Director of the Executive Office for United States Trustees, announced October 30, 2001.

"Effective case administration is vital to ensure the American public that the bankruptcy system provides relief for honest but unfortunate debtors overcome by serious financial difficulties," Davis stated. "The Civil Enforcement Initiative emanates from the U.S. Trustee Program's long-standing commitment to enforce the Nation's bankruptcy laws and explore other meaningful strategies to bolster public confidence in the integrity and effectiveness of the bankruptcy system."

"The priorities of the initiative will require a concerted effort nationwide to use existing tools in a way that best accomplishes tangible results and improvements for case administration," Davis continued. "Many of our offices use such strategies today and we hope to build upon their experience. By focusing our resources on these priorities, we also seek to address some of the concerns that have been at the forefront of debate in recent years both before Congress and in other public venues. In the end, this is very much a community effort that will require communication and cooperation with private bankruptcy trustees and with the bankruptcy bench and bar."

These are the priorities of the Civil Enforcement Initiative:

- Ensuring that Chapter 7 is not abused and that Chapter 7 debtors are held accountable. Chapter 7 debtors who do not comply with the law will have their cases converted or dismissed, or their bankruptcy discharges denied or revoked. Enforcement measures include motions to dismiss Chapter 7 cases under 11 U.S.C. §§ 707 (a) and 707(b), and complaints to bar or defer discharge under 11 U.S.C. § 727.

- Protecting consumer debtors, creditors, and others who are victimized by those who mislead or misinform debtors, make false representations in connection with a bankruptcy case, or otherwise abuse the bankruptcy process. Attorneys and bankruptcy petition preparers (non-attorneys who prepare bankruptcy documents for a fee) must engage in full disclosure, be free of conflicts of interest, and engage in ethical practices. Enforcement measures j include motions for sanctions, contempt of court, and disgorgement under 11 U. S.C. § 329 for misconduct by attorneys, and complaints and motions under 11 U.S.C. § 110 for misconduct by bankruptcy petition preparers.

- Ensuring that Chapter 11 debtors proceed with their cases promptly, and are informed of and held to account for their obligations under the Bankruptcy Code. Enforcement measures include Initial Debtor Interviews and motions to convert or dismiss Chapter 11 cases under 11 U. S.C. § 1112.

- Fighting fraud and abuse by making criminal referrals and assisting United States Attorneys in criminal prosecutions.

The U. S. Trustee Program is a component of the Justice Department that oversees the administration of bankruptcy cases and intervenes in court to enforce the bankruptcy laws. There are 21 regions in the Program, each headed by a U.S. Trustee appointed by the Attorney General. The Office of the United States Trustee for the Tampa/Fort Myers Division is part of Region 21 and handles all bankruptcy matters for cases filed in the Tampa and Fort Myers Division of the Middle District of Florida. If you have any questions regarding the new Civil Enforcement Initiative or want to report an abuse of the bankruptcy system, please submit all requests and information in writing to the Office of the United States Trustee, 501 E. Polk St., Suite 1200, Tampa, Florida 33602.

View From The Bench

MANDATORY DISCLOSURES: A QUICK REVIEW

By Honorable C. Timothy Corcoran, III

Most practitioners in our court became exposed to mandatory disclosures on December 1, 2000, when substantial changes to the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and our local rules took effect. Although more than a year has passed since then, many practitioners have not had the opportunity to gain familiarity with the mandatory disclosure rules. Several lawyers asked me, therefore, to review the basics of mandatory disclosures in this issue of *The Cram Down*. Here goes.

When Do Disclosures Apply and What Are They?

The first point is that mandatory disclosures apply only to adversary proceedings. They do not apply to contested matters unless the presiding judge specifically orders their application.

The second point is that there are three distinct kinds of mandatory disclosures: Rule 26(a)(1) initial disclosures, Rule 26(a)(2) expert disclosures, and Rule 26(a)(3) pretrial disclosures.

1. Rule 26(a)(1) Initial Disclosures.

F.R.Civ.P. 26(a)(1) requires the disclosure of witnesses and documents "that the disclosing party may use to support its claims or defenses" and of the computation of any category of claimed damages together with the documents on which the computation is based. Basically, these disclosures are the initial lists of witnesses and exhibits that, at the beginning of the proceeding, the disclosing party has determined may be used in the proceeding.

Disclosure of a witness means the name, address, and telephone number of the witness, if known, and an identification of the subjects of the discoverable information held by the witness. Disclosure of a document means a description by category and location of all documents, data compilations, and tangible things that are in the possession, custody, or control of the disclosing party.

A party need not disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. "Use" is defined to include "any use at a pretrial conference, to support a motion, or at trial," except when used solely for impeachment.

Although the rule exempts certain kinds of cases and proceedings from mandatory disclosure, few of the stated exemptions would apply in bankruptcy cases. Thus, the most useful exemption to mandatory initial disclosure is the agreement of the parties. The parties may stipulate to forego these disclosures, and there appears no requirement that the court approve such a stipulation.

These disclosures must be made very early in the proceeding, within 14 days after the Rule 26(f) conference, unless a different time is set by agreement or court order. The disclosures are to be based on information then reasonably available subject to the duty to supplement the disclosures. One may not avoid disclosure because the party has not fully completed its investigation of the case, because it challenges the sufficiency of the other party's disclosures, or because another party has not made its disclosures. Supplementation is required "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

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Nothing precludes a party from using traditional discovery methods to obtain further information regarding the matters that are the subject of mandatory disclosures.

2. Rule 26(a)(2) Expert Disclosures.

F.R.Civ.P. 26(a)(2) provides that, in addition to the Rule 26(a)(1) initial disclosures, "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Keep in mind that F.R.Evid. 701, Opinion Testimony by Lay Witnesses, now curtails the scope of "lay" opinion testimony to prevent circumvention of the expert disclosure rule and that expert testimony to be given by a "lay" witness must be included in these disclosures. Thus, if your debtor client, who is also an accountant, is going to testify about accounting principles, you need to include the client in these disclosures because your client will be testifying under Rules 702, 703, and 705

For a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure must include a written report prepared and signed by the witness. The report must include a complete statement of all opinions to be expressed and the basis and reasons for the opinions, the data or information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualification of the witness, the compensation to be paid, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

These expert disclosures are to be made at the times and in the sequence ordered by the court. Typically these dates will be in the trial scheduling order. If the court does not provide a date, the disclosures must be made at least 90 days before the trial date. Although the parties may not stipulate away the mandatory disclosure of expert testimony, the parties can vary the content and timing of the disclosure by stipulation.

As with the initial disclosures, expert disclosures are subject to the duty of supplementation.

3. Rule 26(a)(3) Final Pretrial Disclosures.

F.R.Civ.P. 26(a)(3) provides for the disclosure of information regarding the evidence that may be presented at trial other than solely for impeachment. Basically, this disclosure is the final list of trial witnesses and exhibits.

This disclosure must contain:

1. the name, address, and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises.

2. a designation of those witnesses whose testimony is expected to be presented by deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.

3. an identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures must be made when ordered by the court, typically in the trial scheduling order. If not specifically ordered, the disclosures must be made at least 30 days before trial.

As with the initial and expert disclosures, pretrial disclosures are subject to the duty of supplementation.

Within 14 days after making a pretrial disclosure, unless the court orders a different time, another party may file and serve objections to the use of a deposition designated by the disclosing party and to the admissibility of documents and things. Objections not so disclosed are waived except for objections under F.R.Evid. 402 (relevance) and F.R. Evid. 403 (probative value substantially outweighed by prejudicial effect).

(Continued on page 6)

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Form and Filing of Mandatory Disclosures.

Unless the court orders otherwise, all mandatory disclosures must be made in writing, signed, and served. Mandatory initial and expert disclosures may not be filed with the court unless and until they are used in the proceeding. Mandatory pretrial disclosures, however, must be filed with the court.

Sanctions for Failing to Make Mandatory Disclosures.

So you think all of this is burdensome, and you'll just bag it. Not so fast. If disclosure is not made as required, and if the information is not timely supplemented as required, the information is presumptively subject to automatic exclusion.

References.

This article is a very short summary of intricate provisions of the rules. There are details, exceptions, and nuances in the rules beyond the scope of coverage in this brief article. With the background provided here, however, counsel can quickly fill in the blanks. Here are the rules counsel needs to consult: L.B.R. 7026-1, 9014-1, and 9014-2, including the Notes of Advisory Committee; F.R.Civ.P. 26(a) and 37(c); F.R.Evid. 701, 702, 703, and 705; and F.R.Civ.P. 5(d).

Conclusion.

The rules of mandatory disclosure are designed to facilitate an expeditious and fair determination of litigated disputes. The requirements, however, are comprehensive and detailed. Counsel's careful attention to the rules of mandatory disclosure will make the process flow smoothly and, as importantly, prevent the possibility of a substantial penalty.

Bankruptcy Rules Update

NEW RULES AUTHORIZE SERVICE BY ELECTRONIC MEANS AND OTHER RECENT RULES CHANGES

By Honorable C. Timothy Corcoran, III

Amendments to the Federal Rules of Civil and Bankruptcy Procedure that became effective on December 1, 2001, provide computer-literate practitioners with some new service options.

These new provisions expressly authorize the electronic exchange among parties of documents such as pleadings, motions, and briefs when the parties have consented in writing. They also authorize the court to serve court orders and notices electronically if the parties consent, although our bankruptcy court does not presently have that capability.

As used in the amendments, electronic means includes e-mail, fax, and other such electronic forms of transmission.

The committee note to these amendments states that the party consent required to permit electronic service must be express. It cannot be implied by conduct, such as by listing an e-mail address on counsel's letterhead or pleading signature block. The note also encourages the parties to specify the scope and duration of their consents to electronic service.

Service by electronic means is complete on transmission unless a party learns that attempted service did not reach the person to be served.

Electronic service is treated the same as service by mail for the purpose of giving parties an additional three days to respond. This represents a change from our L.B.R. 9036-1. Our local rule provided that service by fax was a method of hand delivery so that the extra three days did not apply. Pending an appropriate amendment to our local rules, L.B.R. 9036-1 must be considered superseded by this change in the big rules.

As to service by electronic means, the specific provisions amended are F.R.Civ.P. 5(b), 6(e), and 77 and F.R.B.P. 9006(f) and 9022. The amendments to F.R.Civ.P. 5 are incorporated by reference into F.R. B.P. 7005. These new provisions apply equally in adversary proceedings and contested matters because our court's L.B.R. 9014-1 applies in contested matters that portion of F.R.B.P. 7005 represented by F.R.Civ.P. 5(a)-(d), including (b).

The big rules are also amended on the subject of Chapter 11 plans containing injunctions. Service, notice of the injunction, and the way in which the injunction is to be formatted in the plan and disclosure statement are now set forth in F.R.B.P. 2002(a)(3) and (g), 3016, 3017, and 3020.

The contempt rule, F.R.B.P. 9020, has been substantially changed to provide simply that F.R.B. P. 9014 governs. Rule 9014, of course, is the basic rule governing contested matters.

Finally, F.R.B.P. 1007(m) is added to provide that a list or schedule containing an infant or incompetent person must also include the name, address, and relationship of that person's legal representative for purposes of service of process.

Legislative Update

WHATEVER HAPPENED TO THE BANKRUPTCY REFORM ACT OF 2001 OR THE NEW SANCTIONS ON PROPOSED SANCTION PROVISIONS ON ATTORNEYS REPRESENTING CONSUMER DEBTORS

By Honorable Alexander L. Paskay

When Representative Gekas introduced H.R. 333 (the successor to the previous version vetoed by former President Clinton) and Senator Grassley introduced S. 420, it appeared that the reform movement had gained new momentum. Thus, it was not really surprising, in light of the large majority in both Houses on the previous versions, that both Bills passed in March 2001. It was the general consensus that it would only be a matter of time before the differences between the two Bills would be resolved and an agreed version would be on the President's desk and signed into law.

However, two unexpected events occurred which radically changed the picture. First, the Democrats regained control of the Senate. This change produced disagreement as to the make up of the Conference, which was suppose to resolve the more than 150 different provisions between the two Bills. No meeting of the Conferees took place until shortly before the August recess. The meeting failed to produce any tangible results except that Chairman Sennsenbrenner directed the staff to work on a draft dealing with the differences and to make recommendations of various options to resolve the deadlock. A formal meeting of the Conferees was set for September 11, 2001.

It became painfully evident that in light of the terrible disaster visited on New York and the Pentagon, the scheduled meeting was not held. Although Congress remained in session, several appropriation Bills, the Education Bill and the Economic Stimulus package, still had to be passed. It appeared that the Reform Bill was not getting closer to passage and law. This is exactly what happened, it was put on the back burner and no action was taken by the Conference in 2001. Although the House submitted to the Senate several compromises on some of the conflicting provisions, and the original differences were substantially eliminated, no consensus was arrived at by the staff on several of the major and hotly contested provisions. These were the provisions dealing with the homestead exemption, nondischargeability of liabilities resulting from violations in connection with the operation of abortion clinics, and the financial netting provisions.

Several significant provisions of both Bills, which seriously impact bankruptcy practitioners representing consumer debtors, are not in dispute. It is most likely that when the two Bills come up for consideration, the ultimate version will no doubt include these provisions. Therefore, it is appropriate to discuss briefly these very important and significant changes in the new and additional responsibilities of counsel, as well as counsel's potential exposure to sanctions if counsel fails to comply with these new duties, which will be imposed by the ultimate version of the Bill enacted into law.

Section 102 of the current version contains four specific provisions dealing with the role of attorneys representing consumer debtors. All of these provisions are directly related to the very heart of the Reform Bill, which is the "needs-based bankruptcy" or the "means test." According to the sponsors, the bill was designed to curb the alleged wide abuse of

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(Continued from page 8)

the bankruptcy system by consumer debtors who allegedly have the ability to repay all or at least some of their debts, yet file for relief under Chapter 7, where they seek to discharge all their debts with the aid of counsel representing them.

In order to implement this goal, the Reform Bill established a means test that it requires debtors to meet before they are entitled to seek relief under Chapter 7. If they fail the test, the filing is presumed to be an abusive filing, which requires a dismissal of the Chapter 7 case, unless the debtor is willing to convert the case to a Chapter 13 repayment case.

The challenge to the debtor's right to seek relief under Chapter 7 is made by a motion pursuant to a revised version of Section 707(b). If the motion is successful, then Section 102, which amends F.R.B. P. 9011 as part of the Code, provides that sanctions may be awarded.

This Section replaces the current law's presumption in favor of the debtor with a presumption of abuse that is triggered under certain conditions. Section 102(a) requires a court to presume that abuse exists if the amount of the debtor's income remaining, after certain expenses and other specified amounts are deducted from the debtor's current monthly income, when multiplied by 60, exceeds the lower of the following: (1) 25 percent of the debtor's nonpriority unsecured claims or $6,000 (whichever is greater); or (2) $10,000.

This Subsection also amends the current Section 707(b) and permits a court on its own motion, or motion of the United States Trustee, the panel trustee, or the bankruptcy administrator (in states where the U.S. Trustee does not operate, i.e., Alabama and North Carolina), or party in interest to seek a dismissal or conversion on the grounds that to grant relief to the debtor under Chapter 7 would be an abuse.

The mandatory presumption of abuse may be rebutted only if: (1) the debtor demonstrates special circumstances that justify additional expense or adjustment to the debtor's current monthly income for which there is no reasonable alternative; and (2) the additional expenses and/or the income adjustment brings the debtor's monthly gross income, less the deductions, below the means test outlined above.

Even when the mandatory presumption of abuse does not apply or has been rebutted, a court still must consider: (1) whether the debtor filed the Petition in bad faith; or (2) whether the totality of circumstances of the debtor's financial situation demonstrates abuse. Should the court grant the Section 707(b) motion, Section 102 mandates that the court order counsel for the debtor to reimburse the trustee for all reasonable expenses incurred by the trustee prosecuting the motion, including reasonable attorneys' fees. In addition, if the court finds that the attorney violated F.R.B.P. 9011, the court shall, at a minimum, assess an appropriate civil penalty payable to the private trustee, bankruptcy administrator, or the United States Trustee.

In order to implement this provision, the Section also amends F.R.B.P. 9011 by providing that the signature of the attorney: (1) certifies that the attorney performed a reasonable investigation into the circumstances which warranted the relief sought under Chapter 7; or (2) determined that the documents filed are well grounded in fact or a good faith argument can be made for the extension, modification, or reversal of the existing law, and does not constitute an abuse under Section 707(b)(1) of the Code. The term "abuse" is based on the definition of the means test set forth in Section 102 of Title I entitled Needs-Based Bankruptcy.

Moreover, in addition to the foregoing, the signature of the attorney constitutes a certification that the attorney has no knowledge, after an inquiry, that the information furnished in the Schedules filed with the Petition is incorrect.

It appears that Congress intended with these provisions to raise the level of accountability of attorneys representing consumer debtors to a height heretofore unknown. Further, this mandates the imposition of sanctions on attorneys for being wrong, whether by inadvertence in the preparation of the schedules, or for unsuccessfully advocating the debtor's eligibility for relief under the "means test."

Section 102 is also designed to deal with the conduct of the attorney representing consumer debtors and for sanctions after the commencement of the case. There are other provisions in the Bill which profoundly impact the practice of attorneys representing consumer debtors by regulating the manner in which they practice even at the pre-

(Continued on page 10)

(Continued from page 9)

bankruptcy counseling stage.

Section 226 defines the term "debt relief agency," as a person who provides bankruptcy assistance to any person whose debts are primarily consumer debts and whose nonexempt assets are less than $150,000.00. It is clear that attorneys representing consumer debtors would be covered by this provision.

Sections 227, 228 and 229 regulate the conduct of debt relief agencies by imposing several significant restrictions and duties, and provide for significant liabilities if any of these provisions are not complied with. The Sections require these agencies to give specific written disclosure to clients describing various responsibilities of a debtor who files bankruptcy and instructing debtors on the legal requirements as to how to value properties scheduled or the requirements as to how to meet the means test. All advertisements must include specific statements, including a disclaimer by attorneys that they are "debt relief agencies."

Section 227 prohibits attorneys advising a client to incur more debts in contemplation of filing a Petition for Relief under Chapter 7 of the Code, or to pay the attorney's fees. The legal character of some of the required disclosures might very well be considered unauthorized practice of the law by entities other than attorneys who also clearly fit the definition of the term "debt relief agency."

Some of these requirements may very well implicate First Amendment rights similar to provisions of the Medical Fraud Bill, already passed by both Houses and signed into law. That Bill specifically prohibited advising clients to dissipate assets in order to achieve eligibility for governmental benefits. This provision was challenged and was declared to be unconstitutional as a violation of a First Amendment right by the District Court in New York.

All through these provisions, one cannot help but feel that Congress either did not understand the legal relationship between an attorney and a client, or consciously decided to disregard it. It cannot be gainsaid that the relationship is the same as the relationship between a principal and agent, where the client is the principal and the attorney is the agent. It is clear that the principal is the ultimate decision maker, in this case the client, and not the agent, the attorney. Mistakes of counsel are imputed to the client but it still will not be an excuse or immunize counsel from liability. This is really a problem if the debtor is represented by counsel and decides to reaffirm an otherwise dischargeable debt. Section 524 requires the attorney to sign the reaffirmation agreement certifying that the reaffirmed debt does not pose an undue hardship on the debtor or his dependents. In addition, the Bill requires the attorney to certify that, despite a presumption of undue hardship, the debtor is able to make the payments of the reaffirmed debt. If the client insists on reaffirming the debt despite the advice of the attorney, the attorney is exposed to liability if the debtor defaults and fails to make the payments on the reaffirmed debt.

Section 302 also implicates the attorney in the case of repeat filer debtors. If the first case was dismissed, the automatic stay has limited application in successive cases. If the dismissal was based on the debtor's failure to file or produce required documents, the presumption of bad faith cannot be overcome by claiming inadvertence or negligence, but the defense that it was the attorney's negligence may be raised. The Bill's approach turns the agency law discussed earlier, upside down, by allowing repeat filers to invoke the protection of the automatic stay by simply blaming the attorney for the conduct which caused the dismissal of the previous case.

It should be evident from the foregoing that if the Bill ultimately becomes the law, it will have a profound impact on the practice of attorneys representing consumer debtors. There was never any empirical evidence that the attorneys representing consumer debtors are guilty of, or are causing, the so-called bankruptcy abuse which was more perceived than real by the credit card industry. However, the credit card industry has so far succeeded to sell the idea to Congress that there is need for such a radical change of the existing law. But more importantly, the reform legislation is designed to overturn well recognized, established legal principles which traditionally governed the attorney-client relationship.

Terry Miller, District Chief Deputy Clerk...An Introduction

By way of this article, I'd like to introduce myself to the Tampa Bay Bankruptcy Bar membership and to tell everyone what my role will be as the District's new Chief Deputy Clerk.

My bankruptcy career began in 1988 in the Maryland Bankruptcy Court, where I was the deputy-in-charge for the southern division of the court. In 1995, I became the deputy-in-charge for the Orlando Division. In July of this year, I was named the Chief Deputy for Middle Florida. I actually began my court career in the state court system of Michigan in 1985 after receiving my Master's Degree in Judicial Administration from the University of Denver, College of Law. During my career and particularly while working in the bankruptcy courts for 13 years, I have enjoyed many challenges and have seen many changes. Looking back a bit, those changes seem to have been evolutionary rather than revolutionary—nothing like a little hindsight to give one perspective!

Speaking of another change that now appears to me to be revolutionary (but undoubtedly will be considered evolutionary in a few years) will be the introduction of the Bankruptcy Court's newest computer-based case management system, which is simply called Case Management/Electronic Case Filing or CM/ECF. I'll get back to that topic a little later, but let me briefly tell you what a chief deputy's role is and what projects will take up my time.

As chief deputy, I am second in command of the clerk's operation and report directly to the clerk. (Our Clerk is David K. Oliveria, who recently celebrated his first year with the court!) As such, I assist the clerk in management of the court's budget (which totals just over 8 million dollars annually), assist in management of personnel (the clerk's office currently employs over 155 people in 3 offices across the state). Lastly, I assist in management of space and facilities, internal financial management and procurement.

The Clerk has assigned me to head up two major projects. The first one is to oversee the relocation of the Jacksonville Division to the new federal courthouse in downtown Jacksonville. The relocation is currently scheduled for November-December of 2002. The second project that I will be spearheading is to oversea our District's conversion to the new case management system, CM/ECF that I mentioned above.

Chuck Kilcoyne, Tampa's Deputy-in-Charge, wrote an informative summary of CM/ECF in the Summer 2001 edition of ***The Cramdown***. Let me expand on that by explaining what might be considered the "revolutionary" aspect of CM/ECF. Unlike our current system, which many of you experience when connecting to PACER or WEBPACER or from the public access terminals at our intake section, CM/ECF will be an interactive system. For the first time, attorneys will have 24 hour/7-day access to be able to electronically file petitions, complaints, motions, etc. In addition, everyone will have 24/7 access to view not only dockets, but also the filed documents, including signed orders. And, as you or your clients so desire, you will be able to print any document you select. Another major difference will be in the way in which the clerk's office performs its due process role in sending notice to involved participants. That is, most paper notices now sent through the Bankruptcy Noticing Center, will be noticed to your email account as an attachment.

Currently, Middle Florida is scheduled to begin this conversion process next January. Initially, attorneys and all others who interact with us will not see any changes because the conversion process will take a full 10 months to 1 year to complete (CM/ECF doesn't go "live" until the end of this process.) The most important factor that will also

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measure the success of this project is the level and breadth of training that will be undertaken.

Since attorneys and their staffs will be filing pleadings electronically, that process is designed so that as the document is filed, it is also recorded on the case docket. Because of this shift in the way documents are filed, recorded and tracked, any attorney, law firm (or maybe more accurately, their legal staff) will need to be fully trained in how to create electronic documents and then file them in the same fashion. Since our district enjoys the participation of many thousands of attorneys that actively practice in each of the District's locales, this will be the largest single training initiative our district will undertake. It will involve the coordination and involvement of all of the bankruptcy bar organizations in our District, the U.S. Trustee, panel trustees, chapter 13 trustees and of course our judges! Just about every area within the scope of bankruptcy practice will be impacted, from local rule modification to the way in which the clerk's office and judges interact with practitioners. As the conversion date to the new system approaches, please keep an eye out for important information about CM/ECF that will be discussed in this publication as well as in other venues, such as on our website (www.flmb.uscourts.gov).

In closing, I look forward to working with the bar association on this project and in other areas. Our court has always enjoyed the active, professional and cooperative participation of our bar associations and I am confident that this will help guarantee its success.

Related Information

Information about CM/ECF including technical information about hardware and software requirements and links to bankruptcy courts currently using CM/ECF can be found on the following website: www.uscourts.gov/cmecf/cmecf.html

Did you know that you can register to receive notices from the court over your facsimile machine or via email? To find out how, visit our website, www.flmb.uscourts.gov, then select the "Procedures" tab, then select "Electronic Bankruptcy Noticing."

JUDGE CORCORAN'S MENTORING PROGRAM FOR JUNIOR LAWYERS

Next Session on March 20

The next session of Judge Corcoran's mentoring program for lawyers new to the practice of law is scheduled for Wednesday, March 20, 2002, from 12 o'clock noon to 1 o'clock p.m. in the bankruptcy court's training room on the 5th Floor, north side, of the Sam M. Gibbons U. S. Courthouse.

The program is generally designed for lawyers within their first five years of practice or new to the practice of bankruptcy law. It will provide the opportunity for these lawyers to meet with Judge Corcoran on a monthly basis in an informal setting to discuss the challenges they are experiencing in their professional lives, including those involving representing their clients in bankruptcy court.

Each month, Judge Corcoran will have a short program on the basics of lawyering. Participating lawyers will have the opportunity to discuss and ask questions concerning the topics discussed as well as raising other issues or questions of interest or concern. In this way, Judge Corcoran will be available to new lawyers to help them work through problems and offer senior lawyer guidance to help them develop professionally, ethically, and responsibly.

Lawyers wishing to participate simply need to come. No "sign up" or registration is required. Participants are invited to bring a brown bag lunch if they wish. Canned drinks are available from the vending machines open to the public on the 3rd Floor of the Courthouse. The monthly programs will be designed to last no longer than one hour.

For questions, call Judge Corcoran or his law clerk, Cheryl Thompson, at (813) 301-5200.

THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

Sam M. Gibbons U.S. Courthouse
801 North Florida Avenue
Suite 1620
Tampa, Florida 33602-3899

Thomas E. Baynes Jr., Chief Judge

David K. Oliveria, Clerk

Press Release

January 2, 2002

Bankruptcy filings in the Middle District of Florida, rose to a calendar year historic high during 2001. Bankruptcy cases for the District totaled 49,013 in 2001, up 21.4 percent from the 40,364 filings for calendar year 2000, according to records maintained by the Court.

District	CH 7	CH 11	CH 12	CH 13	Total
2001	35746	311	4	12952	49013
2000	28352	240	4	11768	40364
1999	30437	280	12	10899	41628
1998	35142	318	6	9907	45373
1997	33340	323	14	8577	42254

Tampa	CH 7	CH 11	CH 12	CH 13	Total
2001	16983	175	2	6972	24132
2000	13836	157	2	6075	20070
1999	14982	182	4	5700	20868
1998	17624	208	4	5061	22897
1997	16995	191	3	4296	21485

Orlando	CH 7	CH 11	CH 12	CH 13	Total
2001	10535	93		2276	12904
2000	8038	39		2187	10264
1999	8534	60	1	2152	10747
1998	9334	60		2037	11431
1997	8986	72		1806	10864

Jacksonville	CH 7	CH 11	CH 12	CH 13	Total
2001	8228	43	2	3704	11977
2000	6478	44	2	3506	10030
1999	6921	38	7	3047	10013
1998	8184	50	2	2809	11045
1997	7359	60	11	2475	9905

Cooperating closely with the District Court, the Bankruptcy Court of the Middle District of Florida has optimized the use of available technology in order to appropriately process the increase caseload. Employing videoconferencing with remote sites, use of the National bankruptcy noticing center, and locally produced enhancements in bankruptcy processing software, the judges and employees of the court have continued to meet the needs of the citizens of the District and Nation.

Geographically, the Middle District of Florida stretches approximately 260 miles from north of Jacksonville to south of Naples and is physically equivalent in size to the State of West Virginia. Three of the four largest cities in Florida - Tampa, Jacksonville, and Orlando - are in the district. Demographically, nearly 60% of the State's population resides within the district. The population is roughly equivalent to that of the State of Georgia, New Jersey or North Carolina. Seven of the ten most densely populated counties in the State are in the Middle District.

CASE LAW UPDATE

By Dennis J. Levine

Does a secured creditor have to return a vehicle legally repossessed pre-petition - The effect of In re Kalter

On many occasions, after a vehicle is repossessed the customer will file bankruptcy (generally Chapter 13) and demand that the creditor return the vehicle. Creditors, of course, are loathe to return a vehicle to the debtor after repossession. The legal issue, of course, is whether or not the creditor's continued possession of the car, without more, constitutes a violation of the automatic stay. A preliminary issue, though, is whether or not after repossession, the car continues to be the debtor's property.

In In re Kalter, 257 B.R. 93 (M.D. Fla. 2000), the debtors' vehicle was lawfully repossessed pre-petition. The day after repossession, the debtors filed Chapter 13. The debtors notified the secured creditor that they had filed bankruptcy. The secured creditor, Bell-Tel Federal Credit Union ("Bell Tel"), did not return the vehicle to the debtors. The debtors filed a Motion for Turnover and a Motion for Sanctions against Bell-Tel.

The Bankruptcy Court found that the vehicle was property of the bankruptcy Estate, and directed Bell-Tel to return the vehicle to the debtors. The Bankruptcy Court also directed the debtors to make adequate protection payments to Bell-Tel. Subsequently, the Bankruptcy Court granted the debtors' Motion for Sanctions, and sanctioned Bell-Tel $6,435. Bell-Tel appealed both Orders.

The issue on appeal was whether a vehicle subject to a security interest and lawfully repossessed pre-petition was property of the Bankruptcy estate at the time of the filing of the debtors' bankruptcy petition. Judge Young, the District Court Judge, first reviewed the Eleventh Circuit case of In re Lewis, 137 F.3d 1280 (11th Cir. 1998). The Eleventh Circuit found in Lewis that under Alabama law [where Lewis filed Chapter 13], the bankruptcy estate retained as a part of the estate property the debtor's right to redeem the repossessed vehicle, but otherwise, the ownership and possessory interest in the vehicle had vested in the creditor pre-petition at the time of repossession. Judge Young analyzed Florida Statute 319.28(1)(b), which states that upon repossession the party from whom the vehicle was repossessed is the "former owner." Judge Young stated that "the Florida courts construed Florida Statute Section 319.28 as causing ownership to pass, regardless of the fact that formal title had not yet transferred pursuant to Florida Statutes 319.22, .33, or .28." Judge Young also rejected the argument that at the time of repossession, Florida Statute 679 [the Uniform Commercial Code provisions which apply to secured creditors] does not operate to cause title to pass. See In re Iferd, 225 B.R. 501 (Bank. N.D. Fla 1998) (J. Killian). The District Court ruled that title had passed at the time of repossession under Florida Statute 319.28. Accordingly, the District Court reversed the rulings of the Bankruptcy Court, and entered a judgment in favor of Bell-Tel.

Judge Friedman in the Southern District followed Kalter in In re Ragan (Case No. 01-33296-BKC-

(Continued on page 17)

Calendar of Events

Date	Event	Time	Location
March 12	Litigation Tips—Judge Corcoran and Panel	[TBA]	Hyatt Regency, Tampa
April 4-6	Southeastern Bankruptcy Law Institute	[TBA]	Grand Hyatt,
April 12	Chapter 13 Seminar	[TBA]	Hyatt Regency, Tampa
April 19-22	ABI Spring Meeting	[TBA]	J.W. Marriott
April 9	Chapter 13 Seminar (1/2 day)	[TBA]	Hyatt Regency, Tampa
May 14	Bankruptcy Law Update	[TBA]	Hyatt Regency, Tampa
June ___	Annual Dinner	[TBA]	Hyatt Regency, Tampa

CLE COMMITTEE NEEDS YOU!

The CLE Committee could use your help with our monthly meetings and CLE programs. We also need to help the annual dinner and its theme. Please call Ed Rice (229-3333) or David Tong (224-9000) today to get involved.

(Continued from page 15)
SHF). In Ragan, the debtor filed an Emergency Motion for Turnover. Judge Friedman stated that "upon careful consideration of the Eleventh Circuit's ruling in *Lewis*, in conjunction with the ruling in *Kalter*, this Court concludes that, under Florida law, pre-petition repossession of a motor vehicle by a secured creditor divests the debtor of all rights and interest in such vehicle, with the exception of a right of redemption." Judge Friedman noted that in Kalter, the District Court found that the Lewis decision was applicable to Florida law. In re Kalter, 257 B.R. at 96. As a result, Judge Friedman denied the debtor's Emergency Motion for Turnover. The Ragan case currently is on appeal.

Judge Paskay in the Middle District recently followed Kalter. See In re Martinez, (Case No. 01-16101-9P3)(November 5, 2001). In Martinez, the Court reviewed Judge Young's decision in Kalter, and stated "There is no doubt that this Statute radically changes the previously held generally accepted view that, notwithstanding a repossession of a vehicle, the Debtor retains ownership until the vehicle is sold and the creditor who repossessed the automobile has an absolute duty under Section 542 of the Code to turn over the automobile to the Debtor provided, however, that the Debtor is able and willing to furnish adequate protection of the collateral to the repossessing creditor." Judge Paskay concluded that the Court "cannot ignore the reach and the scope of [Florida Statute 319.22, 23, and 28] as construed by the District Court in Kalter ... ." As a result, the Court denied the debtor's Motion for Turnover and the Motion for Sanctions.

As the above makes clear, a collateral issue involves whether or not individual bankruptcy Judges within the Middle District of Florida are bound by Judge Young's decision in Kalter. In the recent case of In re Vicky D. Baker (Case No. 01-5971-3F3, Adv. No. 01-196), Judge Funk rejected the creditor's argument that he was bound by the District Court decision in Kalter. Judge Funk stated: "A Bankruptcy Court is not bound by *stare decisis* to follow the decision of a single district judge in a multi-judge district." See, e.g., In re Findley, Kumble, et al.,160 B.R. 882, 898 (Bankr. S.D. N.Y. 1993).

In Vicky D. Baker, Judge Funk also specifically rejected the legal analysis in Kalter. Judge Funk noted the case of In re Chiodo, 250 B.R. 407 (Bankr. M.D. Fla. 2000), in which an Orlando Bankruptcy Court denied a creditor's request for relief from the stay to sell a vehicle repossessed from the debtor pre-petition. In Chiodo, the Bankruptcy Court found that the debtor maintained an interest in the repossessed vehicle until a new Certificate of Title was issued (the Bankruptcy Court's decision in Chiodo also was reversed by Judge Young, relying on Kalter). Judge Funk cited In re Ratliff, 260 B.R. 526, 530 (Bankr. M.D. Fla. 2000), which adopted the reasoning of the Bankruptcy Court in Chiodo.

As the foregoing makes clear, the extent of the debtor's rights in a repossessed vehicle on the date of filing is anything but clear. Parties will have to see how individual Florida bankruptcy judges handle this issue, and perhaps see how the Eleventh Circuit ultimately resolves the issue.

2001 Year in Review Case Law Update Available on the 'Net

Jack Williams, American Bankruptcy Institute Resident Scholar for the Fall 2001 semester, recently completed The Bankruptcy Year in Review 2001, a comprehensive review of last year's significant bankruptcy cases. The document, in pdf format and about 230 pages, can be located by pointing your browser to http://www.abiworld.org/research/yearreview.pdf.

DEBTOR IDENTIFICATION PROGRAM

By Cynthia P. Burnette

Identity thefts and social security number errors in bankruptcy cases cause harm to innocent victims. Due to the increasing number of such complaints, the United States Trustee Program implemented a pilot program in a few selected Districts to track the frequency of the improper use of name or social security numbers in consumer bankruptcy filings. Based on the results of this pilot program, the Debtor Identification Program will be instituted nationwide.

The Office of the United States Trustee for the Tampa/Fort Myers Division of the Middle District of Florida has proposed the following Section 341 Meeting policy changes:

FOR CASES FILED AFTER JANUARY 1, 2002, ALL INDIVIDUAL CHAPTER 7, 13, 11, AND 12 DEBTORS MUST PROVIDE THE TRUSTEE OR UNITED STATES TRUSTEE WITH PICTURE IDENTIFICATION TO VERIFY THEIR IDENTITY AND PROOF OF SOCIAL SECURITY NUMBER.

Acceptable picture identification includes a valid state-issued drivers license, state-issued picture identification, passport, or legal resident alien card. Acceptable proof of asocial security number includes a social security card, a current W-2 form, or some other official document which shows name and social security number. The Section 341 meeting will be continued to the next available calendar date if a debtor does not have the required identification. Consumer practitioners should be aware of this upcoming change and advise their clients appropriately.

UPCOMING MONTHLY MEETING

Judge Corcoran will present an ABA Litigation Section interactive video dealing with frequently encountered litigation issues.

When: Thursday, March 14, 2002

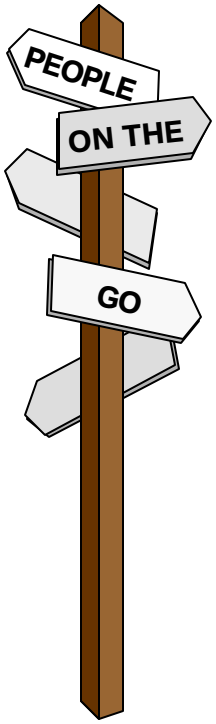
Topic: Litigation Tips

Do you have a comment, idea or suggestion that you would like to share about The Cramdown?

Do you have an article that would be of interest to our members?

If so, please contact Ed Whitson or Donald Kirk.

TBBBA 2001 Holiday Party



Carrie Beth Baris recently joined Bush Ross Gardner Warren & Rudy, P.A. Carrie's practice areas include commercial bankruptcy, business reorganizations and creditors' rights.

The Office of the United States Trustee is very pleased to announce the return of Patrick Tinker as a trial attorney in the Tampa office.

Please contact Amanda Hill with any news concerning TBBBA members at (813) 223-7000 (phone), (813) 229-4133 (fax) or ahill@carltonfields.com.

The Lighter Side...

The reason law schools have been described as "a place for the accumulation of learning" is that first-year students bring some in, third-year students take none out — and so knowledge accumulates.

To make sure you receive upcoming editions of The Cramdown and to have your correct information in the directory, please call

Julia Sullivan Waters

at 813/224-3604.

Julia can also furnish you with an application for renewal of your TBBBA membership.

Reminder!

Please make sure that you have paid your membership dues for this term. Contact Julia Sullivan Waters at 813/224-3604 if you have any questions.

THE OFFICERS AND DIRECTORS OF THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION 2002-2003

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The Tampa Bay Bankruptcy Bar Association
Committee Chairs For 2001-2002

The Association is looking for volunteers to assist us this coming 2001-2002 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairperson(s) listed below.

COMMITTEE	CHAIRS	TELEPHONE	FACSIMILE
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THE ASSOCIATION'S OFFICERS AND DIRECTORS WISH ALL TBBA MEMBERS A HAPPY NEW YEAR!

The Cramdown
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